

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2013

Public Authority: Chief Constable

Address: Sussex Police
Malling House
Church Lane
Lewes,
East Sussex
BN7 2DZ

Decision (including any steps ordered)

1. The complainant requested a "rhyme" that a Chief Inspector had sent to a third party via his Blackberry. The rhyme formed part of the subject matter of a subsequent disciplinary investigation. The Commissioner's decision is that the information requested is held by Sussex Police, it constitutes the personal data of the Chief Inspector and it is exempt from disclosure by virtue of section 40(2).
2. The Commissioner does not require the public authority to take any steps.

Request and response

3. On 7 November 2011 the complainant asked Sussex Police to
 - "Please ... send me a copy of the "joke" nursery rhyme about Hastings that is reported in today's Sun (P.21) as getting the town's Chief Inspector (*name deleted*) in disciplinary trouble. I believe he had emailed it to people from his Blackberry phone".
4. Sussex Police responded on 5 December 2011, relying on section 40 FOIA, refusing to supply the requested information to the complainant.
5. The complainant wrote back to Sussex Police disputing the assertion that the requested information was 'personal data' as defined by the

Data Protection Act 1998 ("DPA") and requested that it reviewed its decision.

6. Following an internal review, the Sussex Police wrote to the complainant on 16 December 2011. It stated that:

"Taking into account your views I am minded to concur that the information is not in itself "personal Information" and is not therefore covered by Section 40 of the Act.

However, I have considered whether the rhyme is official information held by Sussex Police as a Public Authority and therefore covered by the act. In considering this issue I have taken account of the ICO publication, Awareness Guidance No. 12 - When is Information Caught by the Freedom of Information Act and in particular section 9 (b):-

"b) Personal written communications (emails, etc)

In most circumstances private emails sent or received by staff in the workplace would not be held by the authority as it has no interest in them. It will be a question of fact and degree whether a public authority does hold them, dependent on the level of access and control it has over the e mail system and on the computer use policies. It is likely to be the exception rather than the rule that the public authority does hold them."

It is my assertion that the rhyme was a personal written communication between a Sussex Police employee and a member of the public and therefore not official information covered by the act. We are therefore not required to consider disclosure.

(...) Whilst the rhyme itself may have been deemed as inappropriate to have been sent by a member of Sussex Police, it was not an official communication but was a personal communication outside of the provisions of the FOI act".

Scope of the case

7. On 20 February 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. In a letter to the Commissioner, dated 12 March 2012, Sussex Police stated that it remained of the view that the original text message sent by the Chief Inspector was a private communication, and therefore not held by Sussex Police. Sussex Police provided the Commissioner with a copy of the requested information.

9. The Commissioner will firstly consider whether Sussex Police held the information and then whether the information was personal data. Although Sussex Police have withdrawn reliance on section 40(2) the Commissioner finds it is important that this exemption is still considered, in light of his role as other role as regulator of the Data Protection Act.

Reasons for decision

10. The first question the Commissioner has to consider is whether Sussex Police holds the information that the complainant is seeking.
11. When determining whether a public authority holds requested information the Commissioner does so, on the balance of probabilities.
12. The complainant has requested a "...copy of the "joke" nursery rhyme about Hastings that is reported in today's Sun (P.21) as getting the town's Chief Inspector (name deleted) in disciplinary trouble. I believe he had emailed it to people from his Blackberry phone."
13. The Commissioner agrees with the assertion of Sussex Police (paragraph 5 above) that "...in most circumstances private emails sent or received by staff in the workplace would not be held by the authority as it has no interest in them." However Sussex Police did retain a copy of the rhyme for their own purpose, in the particular circumstances relating to this individual. The Commissioner therefore does not doubt that Sussex Police holds the information that the complainant is seeking.

Personal Data

Is the held information personal data?

14. In cases where personal data is likely to be involved, the Commissioner believes he has a duty to consider the rights of data subjects. These rights, set out in the DPA, are closely linked to Article 8 of the Human Rights Act 1998 (the HRA) and the Commissioner would be in breach of his obligations under the HRA if he ordered disclosure of information without having considered those rights.
15. Personal data is defined in section 1(1) of the DPA as -

...data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.

16. Thus, two criteria need fulfilling for information to constitute personal data. The information must relate to an individual, and that individual must be identifiable from that information directly or in combination with other information available to the holder of that information.
17. The Commissioner notes that the withheld information is information that clearly relates to an individual, the Chief Inspector whose name is readily identifiable via the press. The information was sent from his phone and the information is clearly held by the Sussex Police in a way that clearly relates it to him. Context is important and in this context the Commissioner accepts that the public would learn something about the Chief Inspector if it was disclosed.
18. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the DPA.
19. In considering whether disclosure of personal data would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner considers the following factors:
 - The data subject's reasonable expectations of what would happen to their personal data.
 - The consequences of disclosure.
 - The balance between the rights and freedoms of the data subject and the legitimate interests of the public.
20. As the Commissioner considered that the information requested may have been personal data he provided Sussex Police with an opportunity to provide him, if it so wished, with any submission on this point.
21. Sussex Police stated that if the information was released it considered that two of the Data Protection Principles would be breached. Sussex Police also provided some further arguments that the Commissioner has considered in confidential annex attached to this notice, which will only be available to Sussex Police.
22. Sussex Police submitted that the first Data protection principle requires that personal data must be processed fairly and lawfully, and shall not be processed unless one of the conditions in Schedule 2 of the Data Protection Act 1998 ('the DPA') are satisfied. Sussex Police do not consider that any of these are satisfied. Firstly, the Chief Inspector is aware of the request and is supportive of Sussex Police's decision to withhold the information. He has not consented to the disclosure of this information, and therefore the first condition is not satisfied.

Additionally it does not consider that the second, third, fourth or fifth conditions are appropriate in the circumstances of this case.

23. As to the sixth condition, i.e. that the processing is necessary for the legitimate interests of the data controller, or of a third party to whom the data is disclosed. Sussex Police explained that whilst this information may be interesting to the public, it did not consider that it is in the public interest for this information to be disclosed given its offensive nature. It did not consider that the processing is necessary for the legitimate interests of the third party to whom the information would be disclosed. Information concerning the way in which the Chief Inspector was investigated and disciplined may be for a legitimate interest, i.e. ensuring that the police are properly held to account. However, the content of the 'rhyme' has no bearing on the probity of the investigation or the transparency of Sussex Police in handling this matter.
24. The original text message sent by the Chief Inspector, Sussex Police maintain, relates to his personal life. Sussex Police Officers issued with mobile phones are expressly permitted to use them for private (non-Sussex Police business) purposes. The Force has a published process for Officers reimbursing Sussex Police for personal use of their mobile phone, and it is common practice for Officers to use their mobile phones to contact partners, family members and friends. As such, any Officer of Sussex Police, including the Chief Inspector, could reasonably expect that private communications on their mobile phone would not be made available to members of the public. The text message was received by the Chief Inspector whilst he was off duty and forwarded to a friend in a private capacity.
25. Any disciplinary investigation into the Chief Inspector would relate to the Chief Inspector's public life, i.e. his work as a police officer. For this reason Sussex Police has sought to ensure that the investigation was conducted transparently and effectively.
26. Sussex police state, and the Commissioner accepts, that the data subject has explicitly stated that he does not want this information released to the public.
27. Where the data subject has not expressed consent to the disclosure of their personal data the Commissioner adopts the following approach when considering fairness:
 - Non- expression of consent is not absolutely determinative as to whether the data subject's personal data will be disclosed.

- It also remains important to still consider whether it would be reasonable for the data subject to object to the disclosure
28. The Commissioner's position therefore is that the data subject's non-consent to the information release is not solely determinative as to whether the release would be fair or not. The non-expression of consent is one, albeit important, factor that has to be weighed against those factors which focus on the public interest in releasing the information.
 29. The Commissioner does not doubt that some of the consequences of disclosure are likely to be "uncomfortable" for the data subject. In that the data subject may well face criticism from, at least, some of the public and interested parties due to the information released. The consequences for the data subject can therefore be said to be adverse to the data subject. This would also be following any process already completed by Sussex Police. The data subject could essentially be forced into a "trial by public opinion". Whilst there could be some public interest in the open debate the Commissioner acknowledges the distress this would cause and the potential unfairness, particularly following the conclusion of the disciplinary process.
 30. Sussex Police have conducted an investigation into the conduct of one of its own senior officers. The Commissioner is not aware of any evidence that indicates that the investigation was somehow jaundiced or flawed - there is not a strong public interest in releasing the information on this basis.
 31. Whilst the Commissioner does recognise a legitimate interest in the public, including Sussex residents, knowing the nature of the issues raised by the rhyme in question. Disclosure would also enable the public to ask further questions of Sussex Police about what actions they took and the Force's duties under the Equality Act. However, in the circumstances of the case Commissioner finds that these factors do not provide a case that the disclosure is not necessary and proportionate, when considering the prejudice that would be caused.
 32. The Commissioner has also relied on further arguments on why the disclosure would be unfair in the confidential annex.
 33. The Commissioner finds that the disclosure of the information would be unfair and breach the first data protection principle. The information is therefore exempt under section 40(2).

Right of appeal

34. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Steve Wood
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Information Commissioner's Office
Wycliffe House
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